

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

November 8, 2007 Session

MARY ANN ARMSTRONG v. DAVID PIERRE ARMSTRONG

Direct Appeal from the Chancery Court for Rutherford County
No. 03-7011DR Don R. Ash, Chancellor

No. M2006-02713-COA-R3-CV - Filed March 5, 2008

This is an appeal from a divorce action. At the beginning of the trial in the case, the trial court indicated it would not entertain evidence relating to an award of alimony to the wife because she had no pleading requesting any relief before the court. The court then proceeded to hear evidence relating to the grounds for divorce and the division of the marital estate. After setting aside two funds that had been established as college funds for the benefit of the parties' minor child, the trial court awarded sixty percent of the parties' remaining marital estate to the wife. She was charged, however, with the proceeds from the sale of the marital residence that she had received during the pendency of the divorce and had depleted prior to the divorce hearing. She was also required to assume responsibility for the credit card indebtedness that she had accumulated during the pendency of the divorce and while she was receiving spousal support. Wife has appealed, primarily challenging the action of the trial court in excluding from the trial the issue of alimony and the trial court's division of marital property. After a careful review of the record, we affirm the judgment of the trial court as modified to accurately reflect the trial court's oral ruling made at the conclusion of the trial.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., and WALTER C. KURTZ, SP. J., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Mary Ann Armstrong.

Diana Benson Burns, Derek R. Howard, Murfreesboro, Tennessee, for the appellee, David Pierre Armstrong.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This is a divorce proceeding between Mary Ann Armstrong and David Pierre Armstrong. The parties were married May 15, 1976. The original action seeking a legal separation was filed by Ms. Armstrong on July 22, 2003. At the time the action was filed, the trial court caused to be issued the restraining order required by Tennessee Code Annotated section 36-4-106, restraining the parties from transferring or disposing of any marital property. The restraining order also required each of the parties to maintain records of expenditures made during the pendency of the action. On August 27, 2003, Mr. Armstrong filed his answer and a countercomplaint for divorce. On September 17, 2003, an answer to the countercomplaint was filed. On November 24, 2003, Ms. Armstrong dismissed her complaint for legal separation and the action proceeded on the basis of Mr. Armstrong's countercomplaint.

On January 26, 2004, Ms. Armstrong's original attorney was allowed by the trial court to withdraw from the case. On November 2, 2004, Mr. Armstrong filed a motion to set the case for trial. Thereafter, new attorneys for both parties entered appearances. By agreed order entered August 11, 2005, the case was set for trial on October 31, 2005. For reasons not apparent from the record the case was not tried on that date. On March 2, 2006, the attorney for Mr. Armstrong filed a motion for a scheduling order. Such an order was entered by the trial court on April 25, 2006, providing for the completion of discovery and setting the case for trial on August 24, 2006. On August 8, 2006, Ms. Armstrong's second attorney moved the trial court to be allowed to withdraw because Ms. Armstrong had voiced serious dissatisfaction with his representation. That motion was granted by the trial court on August 16, 2006. According to the recitations contained in an order entered by the trial court, Ms. Armstrong appeared on August 24, 2006, and moved the trial court for a continuance in order to obtain counsel. The trial court reset the matter for October 9, 2006, suspended the previously ordered spousal support, and required Ms. Armstrong to reimburse Mr. Armstrong for the attorney fees he incurred in preparing for the trial on that date and the hearing held August 16, 2006.

The case was finally tried October 9, 2006. Ms. Armstrong appeared on that date and was represented by counsel. During opening statements, Mr. Armstrong's attorney indicated that an issue to be determined was whether Ms. Armstrong was entitled to alimony. The trial court responded by asking how it could award spousal support when Ms. Armstrong had no action pending before the court and, thus, no prayer for such relief. Ms. Armstrong's attorney responded, "I guess I'm kind of at a loss in that respect, if she does not have a complaint pending as far as her spousal support is concerned." After further colloquy with the court, the attorney stated, "basically, we are here today then asking that the Court divide this property in an equitable division." Never did the attorney request the trial court that Ms. Armstrong be allowed to amend her answer to the countercomplaint to request such relief, nor ask for a recess or a continuance in order to correct the pleadings. The trial was allowed to proceed on the issues of divorce, development of a parenting plan and division of marital property.

David Armstrong testified that the marital residence of the parties had been sold on December 13, 2004. At the closing, the parties received \$32,017.65, which was all paid to Mrs. Armstrong. Ms. Armstrong received all the personal property located in the home except for a treadmill that was taken by Mr. Armstrong along with his personal clothing. Mr. Armstrong estimated the market value of the treadmill to be \$300.00 and the market value of the remaining belongings that Mrs. Armstrong took to be \$3,000.00.

The parties maintained two educational savings accounts, one a Timothy Plan Account and the other a John Hancock 529 account that were established for the use of the parties' minor child to pay college expenses. The value of these accounts totaled \$19,383.24. Mr. Armstrong had an annuity account with Allianz Life Insurance Company with a cash surrender value of \$147,275.22. According to Mr. Armstrong, early withdrawal from that account would subject him to a penalty and the payment of income taxes. Mr. Armstrong testified that he had about \$200.00 in the Merck Credit Union in Linden, New Jersey, and a checking account with a current balance of \$2000.00.

Following separation, Mr. Armstrong and Ms. Armstrong had each purchased a condominium. Mr. Armstrong testified that his condominium had a value of \$119,000.00 and a mortgage of \$117,000.00. There was no evidence of the value of Ms. Armstrong's home nor the amount owed on it. She testified that she made a \$13,000.00 down payment when she purchased the home. At the time of the separation there was no marital debt other than the mortgage on the family residence that had been paid when sold. During the pendency of the divorce Mr. Armstrong sold some Wal-mart stock and received \$6,000.00.¹ Mr. Armstrong testified that he paid auto repair bills and an income tax bill of \$3600 with the proceeds of that sale.

The minor child of the parties, who was seventeen years of age at the time of trial, had been living with Mr. Armstrong since November 2005. He requested that she be allowed to continue living with him and agreed to wholly support her.

It is impossible to determine the financial status of Mrs. Armstrong from her testimony or from the record² with any degree of accuracy. Her testimony concerning financial issues was confusing, often contradictory and not supported by documentation. For example, she testified she borrowed \$3,000.00 from the AEDC Credit Union in order to pay the closing costs on the sale of the home and, therefore, only received a net of \$29,000 from the sale.³ The settlement statement, however, indicated all closing costs were paid from the monies paid by the buyers of the property.

¹Mr. Armstrong provided the trial court a statement that reflected on June 6, 2005, the Wal-mart stock had a value of \$5,460.63.

²According to Rule 12.02 of the Local Rules of Practice for the 16th Judicial District, both parties to a divorce proceeding are to file a sworn statement of assets and liabilities prior to trial. No such statement was filed by Ms. Armstrong.

³At another point in her testimony, she testified the borrowed funds were used to pay closing costs and her moving expenses. No cancelled checks or receipts were offered.

She also testified that she had over \$20,000.00 in medical expenses because Mr. Armstrong had been dismissed from his job and she did not have health care coverage for a time. No medical bills were exhibited to the trial court. Except for that one ninety day period when he lost his medical insurance coverage, Mr. Armstrong provided health insurance for Ms. Armstrong during the separation. She testified she no longer had the \$32,000.00 she received from the proceeds of the sale of the home. She also testified she paid over \$20,000.00 of these funds for medical expenses but did not offer cancelled checks or receipts.⁴

She testified that she has been diagnosed with two blood disorders, fibromyalgia, lupus, and osteoarthritis. Other than her testimony, no evidence of her medical condition was offered. She testified that she last worked in October 2005 as a barber instructor but had quit that job because she could not tolerate the chemicals used by barbers. However, she continued going to the barber college periodically and worked there on a volunteer basis. She testified that she had incurred \$25,000.00 in credit card debt since the parties' separation due to the fact that support money was not placed in the bank on the day it was due. Ms. Armstrong also testified, however, that the major portion of this debt, about \$20,000.00, was incurred for medical expenses. No credit card statements were presented to the trial court to verify her testimony. Ms. Armstrong testified she had actually paid over \$12,000 in medical bills since the separation. No evidence of payments in that amount were presented to the trial court.⁵

From September, 2003, through August 2006, Ms. Armstrong received \$1,300.00 per month in spousal support from Mr. Armstrong. From September 2003 through January 2006, Ms. Armstrong also received \$700.00 per month in child support. Cancelled checks were presented to the trial court indicating that, during the pendency of the divorce, Ms. Armstrong had given over \$9,000.00 to individuals, churches and Middle Tennessee State University. Ms. Armstrong testified some of the checks were for the repayment of loans, but she had clearly noted "gift" on the face of the check. In addition to the foregoing amounts, she also gave money to the parties' twenty-eight year old daughter. Copies of cancelled checks totaling several thousand dollars made payable to Ms. Armstrong or to "cash" were presented to the trial court by Mr. Armstrong's attorney. Ms. Armstrong testified she could not remember how those monies were used. She paid Jared's Jewelers \$1,018.33 for a diamond ring during the pendency of the divorce, but testified she returned the ring for a refund.

Ms. Armstrong is a licensed cosmetologist and barber and has been licensed as a barber instructor since 1994. During the separation she worked at the Christian Broadcasting Network earning \$9.00 per hour and at the Rutherford County Adult Activity Center earning \$8.00 per hour. She has an associates degree in business administration. Mrs. Armstrong testified that she had not worked since October 2005.

⁴On another occasion, Ms. Armstrong testified she had paid \$12,000.00 in medical expenses during the separation.

⁵Copies of some of her cancelled checks were introduced into evidence by the attorney for Mr. Armstrong. Some of these checks, totaling a few hundred dollars appear to have been for medical expenses.

Matt Clag, a private investigator, testified that he went to the Dudley Nwani's Barber Academy on August 11, 2006, and observed Mrs. Armstrong supervising a student who was cutting another man's hair. While Mr. Clag was getting his hair cut, Mrs. Armstrong was also supervising the student cutting his hair. When he asked her if she enjoyed working at the Barber Academy, she stated she was a volunteer there. Ms. Armstrong told Mr. Clag she cut hair in Murfreesboro for people in her church and for others in the Murfreesboro and Christiana, Tennessee, areas. According to Ms. Armstrong she did not ask for money but people gave her money for cutting their hair.

The trial court granted Mr. Armstrong a divorce on the grounds of inappropriate marital conduct and designated him as the primary residential parent of the parties' seventeen year old child. The court noted that Ms. Armstrong testified she was not in good health but there was no proof of her condition other than her testimony. The court found that Ms. Armstrong could, at least, work part time for 20 hours per week earning \$8.00 per hour and calculated her child support based upon that finding.

The court made Mr. Armstrong trustee of the college funds, and provided that if the child did not attend college or if the money was not used for that purpose, then it was to be divided equally between Mr. and Ms. Armstrong. While the trial court appeared to have recognized these funds as a marital asset, he did not include them in the marital estate to be divided between the parties.

In determining the parties' marital estate subject to division, the trial court added together the \$32,000 from the sale of the home, \$3,000.00 worth of personal property in possession of Ms. Armstrong, \$300.00 for the treadmill in Mr. Armstrong's possession, \$6,000.00 for the Wal-mart stock that Mr. Armstrong had sold and \$147,275.22 for the Allianz account. Of that total, the trial court awarded 60% to Ms. Armstrong and 40% to Mr. Armstrong. He charged Mrs. Armstrong with the \$32,000.00 and the \$3,000.00 of personal property, and then awarded her \$78,147.67 from the Allianz account. In addition, he ordered that Mr. Armstrong be responsible for paying any tax consequences that might result from paying her that amount out of the Allianz account. The trial court divided the court costs between the parties and ordered that each party pay their own attorney's fees, except that Mrs. Armstrong was ordered to pay the attorney's fees and court reporter expenses incurred by Mr. Armstrong because of the prior continuance of the trial of the case. The fees and expenses were determined to be \$1,460, which the trial court deducted from the \$78,147.67 leaving a judgment in favor of Ms. Armstrong in the amount of \$76,687.67.

Ms. Armstrong has appealed and alleges the trial court erred by not allowing Ms. Armstrong to present evidence relating to alimony, in the classification and division of the marital estate, and in awarding Mr. Armstrong attorney fees and court reporter expenses incurred by him in connection with continuing the trial date from August 24, 2006.

II. ANALYSIS

1. The trial court's exclusion of the alimony issue.

Ms. Armstrong first asserts the trial court erred by not allowing her to present evidence relevant to the issue of alimony. The trial court, noting that Ms. Armstrong had no request for any relief of any kind other than a request that Mr. Armstrong's countercomplaint be dismissed, indicated it would not entertain that issue. Ms. Armstrong alleges that Mr. Armstrong had notice that she would be making a claim for alimony and the trial court could have allowed the parties to try the issue by consent. Rule 15.02 of the Tennessee Rules of Civil Procedure provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The rule further provides that such amendment of the pleadings as may be necessary to raise these issues may be made upon motion of any party at any time and shall be freely allowed by the trial court if the court is satisfied the admission of evidence on the issue would not prejudice the other party. *Id.* Finally, Rule 15.02 permits the trial court to grant a continuance to the party against whom such an issue is raised to enable that party to meet the evidence regarding the issue. *Id.*

The question before us is not, however, whether the trial court could have allowed the parties to proceed on the issue of alimony or whether the court could have awarded Ms. Armstrong alimony absent a request for such relief. The question before us is whether the trial court erred by excluding evidence relating to the issue of alimony when Ms. Armstrong had no claim for relief of any kind before the court.

This court reviews a trial court's decision to admit or exclude evidence by an abuse of discretion standard. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 131 (Tenn. 2004). A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id.*; Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn.2001). By their very nature, discretionary decisions involve a choice among acceptable alternatives. Reviewing courts will not disturb a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate court would not have chosen. *See, Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708, n. 7 (Tenn. Ct. App. 1999). Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence. *Id.* at 695; Tennessee Dept. of Health v. Frisbee, No. 01 A01-9511-CH-00540, 1998 WL 4718, *2 (Tenn. Ct. App., Jan. 9, 1998).

"It is a fundamental rule of law that in order to receive relief, a party must plead it, request it, and prove it in court with the opposing party having the opportunity to offer proof opposing the items requested." West v. West, M1998-00725-COA-R3-CV, 2000 WL 64268, *3 (Tenn.Ct.App., Jan. 27, 2000); Lewis v. Lewis, No. 89-287-II, 1990 WL 14022 at *3 (Tenn. Ct. App. Feb. 16, 1990). Rule 8.01 of the Tennessee Rules of Civil Procedure provides that a pleading which sets forth a claim for relief shall contain a short and plain statement of the claim showing that the pleader is

entitled to relief and a demand for judgment for the relief sought. Tennessee Code Annotated section 36-4-106(a) requires divorce complaints to specify "such other and further relief to which the complainant may think to be entitled" beyond the divorce itself. Since Ms. Armstrong had no claim for relief before it, the trial court was correctly applying the controlling legal principles when it excluded evidence relating to alimony. We cannot find the trial court abused its discretion by excluding this evidence or refusing to consider this issue.

Moreover, when the trial court indicated it would not hear the request for alimony absent a pleading requesting relief, counsel for Ms. Armstrong conceded she could not proceed with a claim for alimony absent such a claim and asked the court to proceed with the division of the marital property. The attorney representing Ms. Armstrong did not request the pleadings be amended to include such a request nor was the trial court asked to continue the proceeding in order to correct the pleadings. This court is not required to grant relief to a party responsible for an alleged error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an alleged error. T. R. A. P. 36(a).

2. The trial court's classification and division of the marital estate.

a. Equitable division.

Ms. Armstrong alleges the trial court erred in its classification and division of marital property. We note that trial courts have wide discretion in distributing marital property, and their decisions are given great weight on appeal. Dellinger v. Dellinger, 958 S.W.2d 778, 780 (Tenn.Ct.App.1997). The trial court's decision will be presumed correct unless the evidence preponderates otherwise. Id.; Tenn. R.App. P. 13(d). An equitable property division is not achieved by a mechanical application of the statutory factors, but rather by considering and weighing the most relevant factors in light of the facts of each case. Tate v. Tate, 138 S.W.3d 872, 875 (Tenn.Ct.App.2003). Some factors may be significant in reaching an equitable division, and others' importance may be diminished depending on the unique facts of a case. See Cronin-Wright v. Wright, 121 S.W.3d 673, 675 (Tenn.Ct.App.2003). A division of marital property is not rendered inequitable merely because it is not precisely equal. Kinard v. Kinard, 986 S.W.2d 220, 230 (Tenn.Ct.App.1998); Ellis v. Ellis, 748 S.W.2d 424, 427 (Tenn.1988).

Based on our review of the record, we have concluded that the trial court's division of marital property was equitable. The trial court indicated it considered the statutory factors included in Tennessee Code Annotated section 36-4-121 in arriving at its decision concerning the division of property. Primarily because the trial court found Mr. Armstrong had the greater earning power, it awarded Ms. Armstrong 60% of the marital estate and Mr. Armstrong 40%. Moreover, the court required that Mr. Armstrong be responsible for any income tax consequences or penalties associated with withdrawing these funds from the Allianz account which was the principle asset of the parties. In her brief, Ms. Armstrong indicates she should have been awarded the entire marital estate because she is "51 years old, in poor health, had no vocational skills, little earning capacity" and needed money with which to live. The trial court indicated, however, that it was not satisfied with the proof

relating to the poor health of Ms. Armstrong when the trial judge stated: “And I know Mrs. Armstrong tells me she’s not in good health, but I have no proof whatsoever except what Mrs. Armstrong tells me.” The trial judge is in a better position to weigh and evaluate the credibility of the witnesses who testify orally and the credibility accorded the witness’s testimony will be given great weight by this court. In re Conservatorship of Moore, No. W2004-01828-COA-R3-CV, 2005 WL 729185, at *2 (Tenn. Ct. App. 2005). As to her vocational skills, the record reflects Ms. Armstrong has an associates degree in business administration. She also is a licensed cosmetologist and barber and is a licensed as a barber instructor. While we agree with the trial court that Mr. Armstrong has the greater earning capacity, Ms. Armstrong has vocational skills with which she can earn a living.

b. Classification and disposition of the proceeds from the sale of the marital residence.

Ms. Armstrong alleges that the trial court erred in crediting against her the funds she received from the sale of the family residence during the pendency of the divorce. She argues that a trial court dividing a marital estate may properly consider only property that existed on the date of the divorce hearing and since Ms. Armstrong had depleted these funds they should have not been considered as a part of the marital estate. A review of the statutory scheme relating to marital property reveals Ms. Armstrong’s argument is misplaced.

Tennessee Code Annotated section 36-4-121(b)(1)(A) defines marital property as follows:

“‘Marital property’ means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing *and owned by either or both spouses as of the date of filing of a complaint for divorce*, except in the case of fraudulent conveyance in anticipation of filing, *and including any property to which a right was acquired up to the date of the final divorce hearing. . .*” (emphasis added)

Thus, “marital property” includes property owned by either or both spouses as of the date the divorce complaint is filed and property that is acquired during the pendency of the divorce action. Except for fraudulent conveyances made in anticipation of a divorce, property that has been disposed of prior to the filing of a divorce action may not be included in the marital estate. Flannary v. Flannary, 121 S.W.3d 647, 650 (Tenn. 2003). In such cases, trial courts are to consider “[t]he contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property.” Id. at 651. (citing Tenn. Code Ann. § 36-4-121(c)(5)). If a party is found to have dissipated or “failed to preserve” a marital asset the trial court may adjust the division of marital property accordingly. It has been held that the spouse claiming a dissipation or failure to preserve marital property by the other spouse has the burden of proof with regard to this issue. See Wiltse v. Wiltse, No. W2002-03132-COA-R3-CV, 2004 WL 1908803, at *5 (Tenn. Ct. App. Aug. 24,2004).

In our view, marital property owned by the parties at the time of the filing of a divorce action or acquired during the pendency of the divorce action is treated by a different standard. Tennessee Code Annotated section 36-4-106(d) provides, in part:

Upon the filing of a petition for divorce or legal separation, and upon personal service of the complaint and summons on the respondent or upon waiver and acceptance of service by the respondent, the following temporary injunctions shall be in effect against both parties until the final decree of divorce or order of legal separation is entered, the petition is dismissed, the parties reach agreement, or until the court modifies or dissolves the injunction, written notice of which shall be served with the complaint:

(1) (A) An injunction restraining and enjoining both parties from transferring, assigning, borrowing against, concealing or in any way dissipating or disposing, without the consent of the other party or an order of the court, of any marital property. Nothing herein is intended to preclude either of the parties from seeking broader injunctive relief from the court.

(B) Expenditures from current income to maintain the marital standard of living and the usual and ordinary costs of operating a business are not restricted by this injunction. Each party shall maintain records of all expenditures, copies of which shall be available to the other party upon request.

Thus, the legislature has provided that parties to a divorce action are charged with preserving the marital estate during the pendency of the divorce. They are limited to using current income to maintain their marital standard of living or operate a business unless they have the consent of the other spouse or an order from the court.

The restraining order required by Tennessee Code Annotated section 36-4-106(d) was issued in this case. At the time the divorce action was filed, the parties owned a marital residence. During the pendency of the divorce action and by mutual consent of the parties, the residence was sold. Ms. Armstrong took possession of the proceeds of the sale which approximated \$32,000.00. These monies were not “current income,” but represented an asset of the parties. By the terms of the restraining order, Ms. Armstrong was not at liberty to expend these funds without the consent of Mr. Armstrong or an order from the trial court. She had neither. In our view, the trial court correctly included the asset in the marital estate and was justified in crediting it against the property awarded to Ms. Armstrong under these circumstances.⁶

Ms. Armstrong makes the additional argument that the statute defining “marital property” requires it be “valued as of a date as near as possible to the date of entry of the order finally dividing

⁶The trial court similarly credited the proceeds from the sale of the Wal-mart stock sold by Mr. Armstrong during the pendency of the divorce action against the property that he received in the property division.

the marital property.” Tenn. Code Ann. § 36-4-121(b)(1)(A). Her argument is that since she no longer had the asset, it had no value on the date the trial court divided the property. The fallacy of this argument is that she is the party who disposed of the asset in violation of the restraining order. Absent her wrongful disposition of the sale proceeds, the asset would have been available for valuation on the date of the hearing. Since the monies were not available on the date of the hearing because of their depletion by Ms. Armstrong, the trial court’s valuation of the funds at the time Ms. Armstrong received them was “as near as possible” to its division of the marital estate. To hold otherwise, would allow a spouse to wrongfully dispose of marital property in his or her possession during the pendency of a divorce action and have the court make an equitable division of the remaining property.

c. Disposition of Ms. Armstrong's credit card indebtedness.

Ms. Armstrong similarly contends the trial court erred by requiring her to pay the credit card debt she alleges she had incurred while the divorce action was pending. No credit card statements were presented to the trial court showing the amount of this indebtedness nor were there any receipts, invoices or similar evidence showing the purpose of any credit card expenditures. The claimed indebtedness was incurred during the time Mr. Armstrong was paying Ms. Armstrong spousal support. During most of that same period she was also receiving child support. Ms. Armstrong testified that varying thousands of dollars of the claimed indebtedness was incurred for medical expenses but, except for a period of ninety days during the three year period, Mr. Armstrong was providing medical insurance for the benefit of Ms. Armstrong. Under these circumstances, we cannot find that the trial court abused its discretion by requiring Ms. Armstrong to pay any credit card debt accumulated by her during the pendency of the divorce action.

c. Disposition of the college funds.

Ms. Armstrong asserts the trial erred in awarding Mr. Armstrong the college funds “in trust” for the benefit of the minor daughter. Her complaint is contained in two statements. The first is that Mr. Armstrong is in control of these funds and can use them for his own benefit. The trial court’s disposition provided, however, that “[a]ny of these funds . . . not spent for college tuition, room board, or books will be divided equally between the parties after the minor child graduates from college or is out of college for two (2) years.” In its oral ruling, the trial court provided that Mr. Armstrong would be required to make an accounting of these funds but that requirement was not reflected in the final decree of divorce. Ms. Armstrong’s concern in this regard can be alleviated by modifying the final decree to reflect the trial court’s oral ruling and require that Mr. Armstrong make an annual accounting to Ms. Armstrong of the balances remaining and expenditures made from these accounts during their existence, documented with copies of cancelled checks, statements, and receipts. The second statement made by Ms. Armstrong is that these accounts should have been included in the marital estate. It appears the trial court did consider them marital property but did not include them in the property to be divided between the parties. In our view, Ms. Armstrong is correct that these accounts fall within the definition of marital property as set out above. We are of the opinion, however, that if we consider them marital property and even if they are deemed to have

been awarded to Mr. Armstrong, the division of marital property made by the trial court would not be rendered inequitable. Accordingly, the property division made by the trial court is affirmed with the modification stated above.

3. The trial court's award of attorney fees related to granting Ms. Armstrong a continuance.

Finally, Ms. Armstrong contends the trial court erred by awarding Mr. Armstrong his attorney fees incurred in connection with its granting a continuance of the matter when the case was earlier set for trial on August 24, 2006. In its order granting the continuance, the trial court noted “the Plaintiff (Ms. Armstrong) had knowledge that this matter was set for today, that Plaintiff had ample time to obtain counsel, and that Plaintiff should have been ready to proceed with the trial today.” The trial court continued the case and found that, due to Ms. Armstrong’s failure to be prepared for trial, Mr. Armstrong should be awarded his attorney’s fees incurred in connection with the preparation for the trial on that day and in attending the hearing of her former attorney’s motion to withdraw on August 16, 2006. Mr. Armstrong’s attorney filed an affidavit setting forth the time spent preparing for the previously scheduled trial and included the court reporter’s attendance fee incurred on that date. The trial court, as it had indicated it would, awarded the fees and expenses in the amount stated.

Tennessee Code Annotated section 20-7-103 provides that a trial court may, in connection with the granting of continuances “impose terms upon the party at whose instance the cause has been continued, by making the party pay costs, or otherwise, as may best further the progress of the cause and the ends of justice.” In this case, the trial court was confronted with a party requesting a continuance based upon a lack of diligence. Granting the continuance would cause the other party to incur additional expenses related to preparation for the trial. In such a case, we see no error in the trial court requiring the moving party to defray the additional expense incurred by the other party as a condition to granting the continuance, as permitted by the quoted statute.

III. CONCLUSION

The judgment of the trial court is affirmed, as modified to more accurately reflect the trial court's oral ruling made at the conclusion of the trial below, and this matter is remanded with costs of appeal assessed against the appellant, Mary Ann Armstrong.

DONALD P. HARRIS, SENIOR JUDGE